IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1695

JAMES A. CARINI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*

BRIEF AMICUS CURIAE

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BRIEF AMICUS CURIAE

THE INTEREST OF AMICUS CURIAE IN CARINI v. UNITED STATES

William F. Karlin, Mark Constable, Roy W. Aikin, Ronald G. Saylors, John C. Adams, and Steven C. Wood, six enlisted members of the United States Navy, respectfully submit this brief *amicus curiae* to the Court in support of granting the writ of certiorari.[1]

In this action, two hundred sixty Navy enlisted personnel sought relief from the action of the United

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[1] The original written consents to filing of this brief, from counsel for petitioners and counsel for the government are on file with the Clerk of the Supreme Court.

States Navy which purported to abrogate their right to Variable Re-enlistment Bonuses in the amount of approximately $4,000 per person—an important part of the consideration for their contract agreements. The district court granted petitioners' motion for summary judgment for money damages, in the amount of the value of each member's re-enlistment bonus, Appendix, 9a.[2] On appeal, the court of appeals reversed, holding that petitioners were not entitled to any relief, Appendix, 2a. The enlisted members have now petitioned this Court for a writ of certiorari to review the decision of the Fourth Circuit. The *amici* are presently among the plaintiffs in federal court actions pending in other districts.[3] Each of these cases presents the identical claim for bonuses urged by the petitioners here. The cases represented by *amici* are in the following stages:

(1) William F. Karlin is one of seventy-six individually named plaintiffs in *Alderfer* v. *Schlesinger*, C.A. No. 74-1854 (D.S.C. filed Nov. 26, 1974), in which all proceedings have been stayed since July 9, 1975, pending resolution of the appeal in *Carini* v. *United States*. (Counsel for Karlin represents about forty additional named plaintiffs and other counsel represent approximately thirty additional named plaintiffs in consolidated cases which have also been stayed.)

(2) Mark Constable is a representative plaintiff in *Agnew* v. *Schlesinger*, now *sub nom. Constable* v. *United States*, C.A. No. 75-1624 (D.S.C. filed Sept. 16, 1975), an alleged nationwide class

[2] References to "Appendix" are to the Appendix filed by the petitioners.

[3] These actions are among those referred to in the Petition for Writ of Certiorari, p. 7 n.7 and p. 11 n.5.

action, in which there is pending a motion for transfer and consolidation with *Wood* v. *United States, infra,* pursuant to 28 U.S.C. § 1404(a).

(3) Roy W. Aikin and Ronald G. Saylors are two of 452 individually named plaintiff- appellees in *Aikin* v. *United States*, and *Saylors* v. *United States*, Docket Nos. 75-3348, 75-3238 and 75-3432 (9th Cir., argued May 14, 1976), appeals from the Southern District of California which are awaiting decision in the United States Court of Appeals for the Ninth Circuit.

(4) John C. Adams is one of 232 individually named plaintiffs-appellees in *Adams* v. *United States*, Docket No. 75-3559 (9th Cir., argued May 14, 1976) an appeal from the Central District of California which is awaiting decision in the United States Court of Appeals for the Ninth Circuit.

(5) Steven C. Wood is a representative plaintiff in *Wood* v. *United States*, C.A. No. CV 75-0382-N (S.D.Cal. filed July 8, 1975), in which there is pending a motion for certification as a nationwide class action on behalf of all enlisted members of the Navy who have been deprived of bonuses for reasons identical to those at issue in *Carini* v. *United States*. Government officials have estimated (see footnote 4, *infra*) that there are as many as 30,689 persons similarly situated.

Each of these *amici*, therefore, has an immediate and direct interest in obtaining reversal of the judgment below, and entry of judgment on behalf of the plaintiff enlisted members in *Carini* v. *United States*, 528 F.2d 738 (4th Cir. 1975).

The principal purpose of this brief is to supplement the discussion presented in the Petition of the direct conflict between the legal principles governing federal contracts, as stated in prior decisions of this court, and the approach of the Court below.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because this case presents important questions of federal law that should be resolved by this Court, and because the judgment below is in sharp conflict with prior decisions of this Court governing the construction and enforcement of contracts between the United States and its citizens. See, *esp, Lynch* v. *United States*, 292 U.S. 571 (1934); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947); and *United States* v. *Seckinger*, 397 U.S. 203 (1970).

THE IMPORTANCE OF THE CASE

This case presents issues of great importance, both to thousands of enlisted men in the United States Navy and to the credibility of the military services of the United States in recruiting enlisted members of the volunteer military force.

The attempt by the United States Navy to renege on the payment of V.R.B.'s (conceded by the court below to have been "reasonably expected" by petitioners) has sparked more than two dozen lawsuits. See Petition for Writ of Certiorari, p. 7 n.2 and p. 11 n.5; cf. *In re U.S. Navy Variable Re-enlistment Bonus Litigation*, 407 F. Supp. 1405 (JPMDL 1976). The total value of the bonuses at issue may well exceed $120,000,000, if there are 30,000 sailors affected, as the government asserted in the district court in the *Adams* case.[4]

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[4] See Affidavit of Rear Admiral Charles H. Griffiths, Assistant Chief of Naval Personnel for Enlisted Development and Distribution, dated September 27, 1974, filed by the government in *Adams* v. *United States*, *supra*, p. 3, line 29.

The sheer volume of litigation reflected here, the large number of persons involved, and the considerable significance of the resolution of this dispute to each of the thousands of individuals, clearly establish this case as one involving important questions of federal law, which should be decided by this Court.

Furthermore, the government conduct here at issue strikes at the core of the ability of the United States to recruit sufficient personnel to sustain an all-volunteer military force. This point was emphasized by a commentator in discussing the importance of enforcing promises made to induce military enlistment. Note, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U.Chi.L.Rev. 783, 804-6 (1972):

> "The courts have also assumed that when a person enlists in one of the armed services' special enlistment programs, the provisions in his enlistment documents concerning the special training and duty assignments he is to receive are contractual. Unlike the provisions in the reserve component statements of understanding, the provisions are referred to as "promises" or "guarantees," not only in the enlistment documents, but also in military regulations, recruiting brochures, and mass media advertising.
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> "1. *The Need for Enforcement.* Perhaps the central reason for providing a legal remedy for breach of promise is to encourage voluntary reliance on the kinds of promises necessary in an economic system that depends largely on free exchange rather than governmental compulsion for the distribution of resources. The promotion of reliance on the promises of the government is similarly necessary; to the extent that the government depends on the voluntary action of its citi-

zens, rather than compulsion, to carry out its functions, such as the raising of armies, citizens must be able to rely on the promises that the government has made to induce them to act. If conscription is abolished and if the voluntary action of citizens becomes the sole means of filling the ranks of the armed services, the need to enforce guarantees made to induce enlistment will be particularly great. Recent studies made for the Department of Defense indicate that such promises would be one of the primary inducements of enlistment in an all-voluntary armed force."

Indeed, promises of benefits such as the lump sum Variable Reenlistment Bonus, and its successor, the Selective Reenlistment Bonus,[5] are powerful recruiting incentives, especially in inducing highly qualified persons to sign up for training in "critical rates." However, if the government is allowed to renege on payment of the bonuses in question here, it will set a precedent for future enlisted men undertaking obligations in expectation of bonuses that can be later repealed. Only reversing the judgment below will establish the principles necessary to restore confidence in the representations of military recruiting personnel.[6]

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[5] The Selective Reenlistment Bonus program, enacted in 1974, 37 U.S.C. § 308, is described in the Statutes set forth in the Appendix, pp. 127a-130a.

[6] Cf. *Reamer* v. *United States*, 532 F.2d 349, 352 (4th Cir. 1976) (Craven, J., dissenting):

> "The United States loses when it treats one of its citizens unfairly.
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> * * *
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> "In the new era of the Volunteer Army, I am surprised that the government would want what it has now obtained: a decision which, if publicized, must be read by prospective enlistees to mean: Warning! you may not safely rely upon the terms of your enlistment contract."

THE ERROR OF THE DECISION BELOW

1. The Principles of Lynch v. United States Require that Petitioners Be Paid Money Damages for the Breach of the Contractual Right To Reenlistment Bonuses Which Accrued at the Same Time Petitioners Obligated Themselves To Reenlist.

This Court established long ago that rights against the United States arising out of contracts with agencies of the federal government are protected by the Fifth Amendment to the Constitution. *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *United States* v. *Central Pacific Railroad Co.*, 118 U.S. 235, 238 (1886); *The Sinking Fund Cases*, 99 U.S. 700, 719, 721 (1879). Therefore Congressional power to abrogate government obligations from contracts is narrowly circumscribed. *E.g.*, *Lynch* v. *United States*, *supra*.

A. The enlistment contract incorporated provisions of existing regulations guaranteeing payment of the V.R.B.'s

The district court below found that the contract formed by each petitioner with the government, by execution of the "Agreement to Extend Enlistment" reciting as consideration the "pay, benefits and allowances which will accrue" to each petitioner, incorporated the existing federal statutes and regulations which provided for payment of the Variable Reenlistment Bonus to each petitioner. Appendix 11a. This was in accord with principles of long standing in the decisions of this Court, that contemporary provisions of federal law, including statutes and regulations, are incorporated into a contract. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-85 (1947); *Louisville & Nashville R. Co.* v. *Chatters*, 279 U.S. 320, 330-31 (1929); *Northern Pacific Ry. Co.* v. *Wall*, 241 U.S. 87,

91-92 (1916).[7] In recent years, the government has argued strenuously (and successfully) that applicable regulations are incorporated in military contracts identical to the "Agreements to Extend Enlistment" involved in the instant case. *Rehart* v. *Clark*, 448 F.2d 170 (9th Cir. 1971). The Court of Appeals for the District of Columbia, after a thorough analysis of all applicable regulations, has declared that the correct interpretation of those regulations, and the only interpretation consistent with the statutory scheme of reenlistment incentives, is that petitioners attained eligibility for the VRB payments at the time they modified their service obligations, *i.e.*, when they signed their agreements to extend enlistment.[8] *Larionoff* v. *United States*, — F.2d — (D.C. Cir. 1976), Appendix, 82a-87a. The Court of Appeals below, since it erred in ignoring the fundamental principles of law governing federal contracts, did not even consider or mention the applicable regulations.

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[7] This is a principle of very wide applicability, such that this Court has also held provisions of state statutes also to be incorporated into contracts. *Wood* v. *Lovett*, 313 U.S. 362, 370 (1941); *Farmers & Merchants' Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 660 (1923).

[8] It is this prior attainment of eligibility that differentiates this case from the typical instance where the compensation of a federal employee is changed by statute. The regulations provide that eligibility for VRB payment may be achieved "through any modification of an existing service obligation," Appendix, 84a, 134a, and it makes no difference for the purposes of this case whether eligibility is considered to be achieved at the date that the member modified his obligation by agreeing to extend his enlistment, or at the date the member who had modified his obligation is first certified as also having a critical skill. Cf. *Larionoff* v. *United States*, *supra*, Appendix, 86a, n.27.

The Court of appeals below recognized that the petitioners had understood—and *reasonably* so—that they would be paid the V.R.B. at the commencement of their periods or reenlistment, 528 F.2d at 741-42; Appendix, 7a:

> "When [the petitioners] executed their reenlistment agreements, they had been told of the provisions of § 308(g) and the regulations which seemingly would entitle them to the payment of the V.R.B. They had a reasonable expectation that they would get it, or something reasonably approximating it. . . . [T]hey could not be charged with an awareness that the Congress would so change the statute as to make them unqualified for any special bonus without an extension of their reenlistment agreements. . . . for a total of eight years service rather than of six. Their expectation of the receipt of a special enlistment bonus was a part of the inducement for their signing the reenlistment agreements, and now their expectations are frustrated."[9]

The court of appeals, then, found that *factually* the petitioners had agreed to reenlist[10] in return for pay-

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[9] The existence of the particular bargain for a specified period of extra service, and the reliance upon the expectations reasonably flowing from the statutes, Navy regulations, and specific promises to petitioners establish beyond cavil that the entitlement to V.R.B. is a property right, not a "gratuity" like a pension, retirement pay, or medical services for retirees, none of which are directly bargained for, nor have such "gratuities" any specific reference to a particular contract document, like the Agreements to Extend Enlistment in this case. Many of the petitioners and others similarly situated undoubtedly incurred substantial financial obligations in reliance upon the expected bonus, and were placed in severe straits when the bonuses were not paid.

[10] The terms "extend enlistment" and "reenlist" are used here synonymously, and are also used by the Navy synonymously.

ment of the V.R.B., but *legally* the agreements had to be construed to contemplate statutory change, because, in the view of the court of appeals (unsupported by the factual record or by citation of any authority governing construction of federal contracts), a reenlistment bonus could be withdrawn at any time, at the whim of Congress.[11] The Court reasoned, 528 F.2d at 741, Appendix, 6a:

> "Since . . . . all military pay is not fixed at the time of the enlistment or re-enlistment contract, we think this contract consideration clause anticipated possible statutory change."

This interpretation was clearly erroneous. In an unbroken line of precedent extending more than one hundred years, this Court has held that the United States is strictly bound by the terms of the contracts that it prepares, including those contracts entered into by the military departments. *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970); *United States* v. *Standard Rice Co.*, 323 U.S. 106, 111 (1944);[12] *Garrison* v. *United States*, 74 U.S. 688, 690 (1869). This principle of construction is especially important in interpreting enlistment contracts, which are classical contracts of adhesion, generated by "the Government's vast economic

[11] The irrationality of *this* position in light of the superseding law is demonstrated by the fact that the new Selective Reenlistment Bonuses are paid in annual installments of up to six years. By the logical extension of Congress' "absolute" authority to control these bonuses by statute, Congress could, for solely financial reasons, repeal authority to pay and refuse to appropriate funds to pay the last four or five annual installments of such bonus.

[12] The contract in the *Standard Rice* case had been prepared by the government. *See* 101 Ct. Cl. 45, 53 F. Supp. 717, 722 (1944).

resources and stronger bargaining position." *United States* v. *Seckinger, supra,* 397 U.S. at 216. Had the government wished to preserve the right to reduce or abolish the V.R.B. payments by regulation or by statute, it had only to so provide in the documents it prepared. In fact, the current form of the Enlistment Contract (DD Form 4) includes such a provision.[13] However, as the court of appeals in *Larionoff* pointed out, Appendix, 87a-88a:

> "The Government authored these extension contracts, and it could easily have inserted a provision limiting an enlisted member's VRB eligibility to the award level on the date of actual entry into the period of extended service. Undoubtedly, if such a provision had been included, the Navy would have witnessed fewer extensions of enlistment. But there is no express limitation on eligibility, and the Government is therefore bound by the actual contract terms and the applicable military regulations."

The result in *Larionoff* was dictated by the decisions of this Court, and the result below was directly contrary to them. As this Court stated in *United States* v. *American Surety Co.*, 322 U.S. 96, 102 (1944), referring to a form contract prepared by the government: "we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted. . . ." Yet the Court

[13] "I understand that . . . statutes and regulations applicable to personnel in the Armed Forces of the United States may change without notice to me and that such changes may affect my status, compensation or obligations as a member of the Armed Forces, the provisions of this entitlement agreement to the contrary notwithstanding." No such provision is in any of the enlistment documents signed by petitioners.

below engaged in just such augmenting of the contract terms. The government might have been well advised to spell out an escape clause, but, as in another case involving a Navy contract, the courts should "not revise the contract which [the United States] draws on the ground that a more prudent one might have been made." *United States* v. *Standard Rice Co., supra,* 323 U.S. at 111.

In sum, the court of appeals below erred because it ignored the admonition of this Court in *Noonan* v. *Bradley,* 76 U.S. 394, 407 (1870):

> "... a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and ... when an instrument is susceptible of two interpretations—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

In this case the petitioners and their fellow claimants in other cases took an agreement prepared by the Navy and "upon its faith incurred obligations." As the court of appeals noted below, Appendix, 7a, the interpretation urged by the government works injustice and that sought by the petitioners is consistent with "the right of the case." Therefore, there can be no doubt that the prior decisions of this Court require that the contracts here at issue be construed in favor of recovery by the petitioners.

B. Since the only motive of the statute relevant to petitioners was fiscal savings, the principles of Lynch v. United States protect petitioners' contractual rights to V.R.B.

Under these circumstances, the petitioners had in fact entered a valid contractual agreement with the United States Navy to reenlist. Therefore, the decision of this Court in *Lynch* v. *United States, supra,* is binding, and dispositive of the issues in this case:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power.
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> * * *
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> "To abrogate contracts in the attempt to lessen government expenditure, would not be the practice of economy but an act of repudiation."

See also Perry v. *United States,* 294 U.S. 330 (1935); *The Sinking Fund Cases, supra.*

The court of appeals did not reach the intent of the Congressional repeal of the V.R.B. Every other court that has considered the matter, however, has been persuaded that the true purpose of the statute, and the only purpose of applying it to petitioners, was fiscal savings. *See* the Opinion of the District Court, Appendix, 14a-15a. *Accord: Larionoff* v. *United States, supra,* Appendix, 92a; and statement denying petition for rehearing, Appendix, 117a. Indeed, in its petition for rehearing in *Larionoff*, the United States conceded

"that there was a fiscal purpose behind the Act. . . ." *See* Appendix, 116a. The government has a heavy burden to discharge in proving that a paramount power was invoked, which the district court held was not discharged here. *See Lichter* v. *United States,* 334 U.S. 742, 758-65 (1948); Calabresi, *Retroactivity: Paramount Powers and Contractual Changes,* 71 Yale L.J. 1191, 1202 (1962).

As the district court found, this case is squarely within the principles announced by this Court in *Lynch.* Therefore, the petition for a writ of certiorari should be granted to review the decision below, which did not even mention the *Lynch* decision or its principles.

2. If Petitioners Are Not Entitled to Money Damages, They Are Entitled to Habeas Corpus Relief from Military Control Because of the Failure of the Government to Provide a Consideration That Was Reasonably Relied Upon as an Inducement for Agreeing To Enlist for an Extra Period of Duty.

The court of appeals below found that the petitioners had reasonably expected to receive the V.R.B. mandated by statute at the time they incurred their obligation to reenlist. If the courts are without power to order payment of a V.R.B. because it could not lawfully have been promised (a dubious proposition, as argued *supra*), certainly the courts have the power to relieve the petitioners of their purported obligation to serve the extended terms of enlistment. *Cf., e.g., Peavy* v. *Warner,* 493 F.2d 748 (5th Cir. 1974); *Shelton* v. *Brunson,* 465 F.2d 144 (5th Cir. 1972). As the district court in this case noted, Appendix, 13a at n.3:

> "While Congress, in Brooks [v. United States, 33 F. 68 (E.D.N.Y. 1939)], did abolish the reenlistment bonus, it did not require anyone to serve a term of reenlistment without a bonus."

Certainly this Court will not sanction the result that the petitioners must serve their reenlistment without receiving the principal consideration they reasonably expected for that reenlistment.

CONCLUSION

For the foregoing reasons we urge the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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